Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States

October Term, 1990

ALBERT RUSSO and ANNE RUSSO,

Petitioners,

v.

MASON-McDUFFIE INVESTMENT CO. INC.,
a dissolved California corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In July, 1981, Albert Russo and Anne Russo (hereinafter "The Russos") invested in a real estate project fraudulently financed by a savings and loan association, which was foreclosed in May, 1983. In October, 1983, when they learned they were the victims of a scheme to defraud, the Russos filed suit. In March, 1989, after their other two suits were dismissed for procedural reasons, they filed a third suit under RICO, 18 U.S.C. Section 1961 et seq. Although the scheme was continuing, their suit was dismissed as untimely.

This dismissal raises an important, unsettled and recurring issue:

In light of its liberal construction clause, should the timeliness of a claim for relief under the civil

enforcement provisions of RICO be measured from the end of the unlawful conduct of the perpetrator rather than the discovery of cognizable injury by the victim?

In conflict with other circuits, the Court of Appeals for the Ninth Circuit answered this issue in the negative.

This Petition seeks review of this decision.

List of Parties

The following parties appeared below.

Parties Plaintiff:

Albert Russo and Anne Russo.

Parties Defendant:

Mason- McDuffie Investment Co., Inc., a dissolved California corporation (hereinafter "Mason"). Mason has no apparent subsidiary or affiliate corporation that has issued shares of stock to the public.

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OPINIONS BELOW

The Court of Appeal's opinion was not reported. It is reproduced in Appendix 1, pp. 1- 18. The District Court opinion was not reported. It is reproduced at Appendix 2, pp. 19-29.

JURISDICTION

The Court of Appeals' judgment was entered February 26, 1991. This Petition

is timely filed. Jurisdiction is invoked under 28 U.S.C. Section 1254(1) (certiorari) and 10.1(a) (conflict with other circuits) and (c) (unsettled and conflict) of this Court.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, in relevant part, provides:

Section 1961 Definitions.

As used in this chapter--

(1) "racketeering activity", means...any act... under...Title 18 United States Code...Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud), Sections 2314 and 15 (relating to interstate transportation of stolen property)...;

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(3) "person" includes any individual or entity...;

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(4) "enterprise" includes any individual...or other legal entity...;

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(5) "pattern of racketeering activity" requires at least two acts of racketeering activity...;

Section 1962. Prohibited Activities.

a) It shall be unlawful for any person who has received any income...from a pattern of racketeering activity...to use or invest...any part...or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise...;

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b) It shall be unlawful for any person through a pattern of racketeering activity...to acquire or maintain...any interest in or control of any enterprise....;

c) It shall be unlawful for any person employed by or associated with any enterprise...to conduct or participate in the conduct of enterprise's affairs through a pattern of racketeering activity...; and

d) It shall be unlawful for any person to conspire to violate any of the provision of subdivisions (a), (b), or (c) of this section.

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Section 1964. Civil Remedies.

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c) Any person injured in his business or property by reason of a violation of Section 1962 of this Chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the costs of suit, including a reasonable attorney's fee.

84 Statutes at Large 947 provides:

Section 904 (a) The provisions

of this title shall be liberally construed to effectuate its remedial purposes.

b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided in this title.

STATEMENT OF THE CASE

Albert Russo and Anne Russo (hereinafter "The Russos") borrowed approximately $844,000 to invest in Saratoga Square (hereinafter "Saratoga"), a real estate project, which was financed by State Savings and Loan Association (hereinafter "State"), now American Savings and Loan Association, througn a "bust-out scheme"[1]. Mason-McDuffie

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[1] The scheme employed in this litigation involved a procurer of investors (known as a "flogger"), a corrupted lending institution, and a complicitous developer. Individuals were fraudulently induced to borrow money to invest in a deliberately underfunded construction project. The lending institution then foreclosed on the project and the individuals were left to sue the insolvent developer. Each co-schemer participated immediately in profits from the fraud. The lending institu-

Investment Co., Inc. (hereinafter "Mason") and numerous others procured investors for such projects. Saratoga was developed by Equity Development Co. (hereinafter "Equity"). The numerous investors, including the Russos, obtained their money for their investment by borrowing it from State; their loans were collateralized by their interests in real property separate from and independent of the property involved in Saratoga. The investors were fraudulently induced to invest in a deliberately underfunded project.

When, as contemplated, Saratoga failed, in September, 1982, and State foreclosed, the investors were, therefore,

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...Continued...

tion, too, immediately gained apparent profits from the booking of points and fees. Ultimately, however, the scheme threatened the institution with huge losses, which could only be made up through a government insurance program. Such schemes are paradigmatic of those that produced the current thrift debacle.

left with recourse, as planned, solely against Equity, the insolvent developer. Ultimately, The Russos totally lost their profit in a foreclosure, which was completed on May 23, 1983.

The Russos became aware of the fraudulent character of the financing of the real estate project around October 30, 1983. They filed their first suit on October 24, 1986, under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. Sections 1962(a)-(d); 1964(c), and the Securities Exchange Act of 1934, 15 U.S.C. Sections 78(g)(b) and 78(j)(b). State and Mason, among others, were named. They also sought relief under pendent claims for fraud, fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty.

The Russos' first suit was dismissed for untimely service on May 24, 1988.

A second suit was filed, but Mason also secured its dismissal for untimely service.

On March 1, 1989, a third suit was filed, which named only Mason. It was dismissed on August 23, 1989, as untimely under the period of limitations. The Court of Appeals for the Ninth Circuit affirmed on February 26, 1991.

While The Russos' injury occurred on May 23, 1983, the date their foreclosure was complete, they duly alleged that the fraudulent scheme, in which Mason participated, continued through at least May, 1986. In addition, during the District Court proceedings, the Russos duly requested leave to amend their Complaint to allege the full breath of the scheme, including the identity of its other victims and that it was still continuing. Leave to amend was not granted, however, because the involvement

of the other victims and the continuation of the scheme, beyond the injury to the Russos, was not, according to the District Court, relevant to the application of the period of limitations to the Russos' claim for relief under Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) ("knows or has reason to know of the injury")[2].

The Ninth Circuit declined to depart from its Compton decision, despite the Russos' argument that the Third Circuit's decision in Keystone Insurance Co. v. Houghton, 863 F.2d 1125, 1120 (3rd Cir. 1988) ("knew or should have known that the elements of the Civil RICO cause existed [except for] last predicate act... [that] need not have resulted in injury to

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[2] But see Note, RICO and a Uniform Rule of Accrual, 99 Yale L. J. 1399, 1410 (1990) ("if the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim").

plaintiff") was more consistent with RICO's text, policies, and its remedial thrust.

SUMMARY OF REASONS FOR GRANTING WRIT

This Court must review and reconcile conflicting decisions of the Courts of Appeals on accural of the period of limitations under the civil enforcement mechanism of RICO. The issue is important, recurring, and affects a considerable number of suits.

REASONS FOR GRANTING THE WRIT

1. This Court Must Review And Reconcile Conflicting Circuit Decisions On The Application Of The Period Of Limitations To RICO, An Important Federal Avenue Of Relief For Victims of Aggravated Forms Of Criminal Conduct In The Areas Of Organized Crime, Political Corruption, White-Collar Crime, Terrorism And Violent Groups Generally.

Today, the issue of the timeliness of private claims for relief sought under the civil enforcement mechanism of RICO, an important federal statute, is the subject of a "plethora of different views" among the circuit courts of appeals. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 236 (1989) (comment in reference to construction of "pattern"). See also Id. at 251 (Scalia, J.) ("the widest and most persistent circuit split on an issue of federal law in recent memory"). Depending on how they are characterized, as many as five models are employed by the circuits to apply the period[3]. Unfortunately, "(n)one [of these models]...fully accommodate(s) the textual imperatives of

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[3] Note, "Mother of Mercy is this the beginning of RICO?": The Proper Point of Accrual of a Private Civil Rico Action, 65 N.Y. U. L. Rev. 172, 195-234 (1990) ("Accrual").

[the statute], the policies [it]...seeks to advance, and the general policies underlying statutes of limitations[4]. The need of review in this Court is, therefore, manifest.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO". At first, the Department of Justice and private litigants moved slowly to use RICO criminally or civilly. Today, it is the prosecutor's tool of choice in organized crime, labor racketeering, political corruption, white-collar crime, terrorism, and violent white-hate, Black-hate or anti-Semitic group prosecutions. Oversight Civil RICO: Hearings Sen. Jud. Comm., 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of

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[4] Id.

Asst. A.G. Trott)[5].

RICO criminal prosecutions are running at the rate of approximately 110 per year, of which 48% are in the political corruption and white-collar crime area, 39% are in the organized crime and labor racketeering area, and 13% in other areas[6].[2] In recent years, this Court turned aside efforts to construe RICO narrowly in four criminal appeals. United

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[5] See also Federal Government's Use of RICO Statute and Other Efforts against Organized Crime, S. Rep No. 101-407, 101st Cong., 2nd Sess. 31-36 (1990) ("The successful prosecution of... [organized crime] families...resulted from innovat[ive]....use...of RICO statute..."); N.Y. Times, Oct. 22, 1990, p.1 col. 1 (decline of Mafia attributed by law enforcement officials to "developing cases against the top leadership of organized families and relying largely on...RICO, as a court-room tool.").

[6] Blakey & Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and The Various Proposals For Reform: "Mother of God--Is This The End of RICO?," 43 Vanderbilt L. Rev. 851, 1020 (1990) ("Myths").

States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 465 U.S. 576 (1983); United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drydale v. United States, 491 U.S. 617 (1989).

Private parties did not begin to bring Civil RICO suits until about 1975. Civil RICO suit filings reported by the Administrative Office of the United States Courts are now running at the rate of approximately 1,000 per year. Myths at 1018-19[7] This Court turned aside efforts to construe RICO narrowly in five civil appeals. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Shearson/American Express, Inc., v. McMahon, 482 U.S.220 (1987); Agency Holding Corp. v. Malley, Duff & Associates, 483 U.S. 143 (1989);

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[7] Reported filings may understate the number of actual filings by a factor ranging from 2.6 to 10.6. Myths at 870-72.

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); Tafflin v. Levitt, 110 S. Ct. 792 (1990).

After extensive hearings and much debate, Congress, however, is now finally moving to narrow the scope of Civil RICO. See S. Rep. No. 101-269, 101st Cong., 2nd Sess. (1990) (reporting S. 438); H. R. Rep. No. 101-975, 101st Cong. 2nd Sess. (1990) (reporting of H.R. 5111); Wall Street Journal, May 2, 1991, p.6, Col. 1 (noting reporting of H.R. 1717, identical to H.R. 5111). Nevertheless, the pending legislation does not deal with the application of the period of limitations. As such, the significance of this Petition cannot easily be understated.

2. The Russos' Petition Affords A Comprehensive Vehicle, Including All Aspects Of RICO, To Review The Conflicting Circuit Courts Of Appeals Decisions On

Timeliness.

When Congress enacted RICO in 1970, it did not, "[a]s is sometimes the case with federal statutes," provide for a civil period of limitations. Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 146, (1987)[8]. To avoid "intolerable" 'uncertainty and time-consuming litigation,'" this Court in Agency Holding Corp. adopted a uniform four year period for private enforcement actions under Civil RICO. Id. at 150 (quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985)). Otherwise, forum shopping would have been promoted. See Id. at 154 ("[since] predicate acts will often occur in several states...the danger of forum shopping [is present]"). This period,

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[8] Unless otherwise provided, statutes enacted after December 1, 1990, are subject to an express period of four years. 28 U.S.C. Section 1658.

too, was thought to be consistent with RICO's embodiment of the private attorney general enforcement mechanism and the absence of a "comparable single state law analogue." Id. at 151-52. Nevertheless, the Court then had "no occasion to decide the appropriate time of accrual of a RICO claim." Id. at 157. That time is now.

In one context or another, before and since Agency Holding Corp., and including this appeal, each of the circuit courts has had to face the issue of timeliness of accrual under RICO.[9] The varying rules

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[9] Granite Falls Bank v. Henrikson, 924 F.2d 150, 151 (8th Cir. 1991); Rodriguez V. Banco Central, 917 F.2d 664, 665 (1st Cir. 1990); Bath v Bushkin, Gaims, Gaines and Jonas, 913 F.2d 817, 820 (10th Cir. 1990); Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc., 906 F.2d 1546, 1554 (11th Cir. 1990), cert. denied, April 29, 1991, No. 90-1396; Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988); Davenport v. A.C. Davenport & Son Co., 903 F.2d 1139, 1142-47 (7th Cir. 1990); Riddle v. Riddell Washington Corp., 866 F.2d 1480, 1484, 1489-90, 1494 (D.C. Cir. 1989); Keystone Ins. Co. v. Houghton,

are aptly described, applied, analyzed and criticized in the context of an illustrative hypothetical in Accrual at 234 ((1) Discovery Rule (2) Anti-Trust Rule (3), Last Act Rule (4) Last Act Discovery Rule, and (5) Last Injury Discovery Rule). The Circuit Courts, however, "have not spoken with one voice on this issue...because so far [they]...lack clear guidance from...[this] Court...[or]...any guidance at all from Congress...." Granite Falls, 924 F.2d at 152. Apparently, Congress is

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863 F.2d (3rd Cir. 1988); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1103-1105 (2d Cir. 1988), cert. denied, 490 U.S. 1007 (1980); Pochahantas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); La Porte Construction Co., Inc. v. Bayshore National Bank, 805 F.2d 1254, 1256 (5th Cir. 1986). Neither the Seventh nor the Sixth Circuit has set down a controlling precedent. Coal-Mac, Inc. v. JRM Coal Co., 743 F. Supp. 499, 500-51 (E. D. Ky. 1990)("Hotly contested...[and] have to be resolved by the ...Supreme Court"); Zalocki v. Huber, 743 F. Supp. 623, 628 (E.D. Wis. 1990).

not going to act on this issue. The time for this Court to provide its guidance is, therefore, now.

The Russos' claim for relief offers a comprehensive vehicle to examine each of the relevant contours of the issue. Their claim for relief was filed under each subsection of Section 1962, investment (a), takeover (b), operation (c) and conspiracy (d).

The scheme to defraud involving other victims, continued well after the Russos were injured, learned, or should have learned, of their injury and learned, or should have learned, that it was part of a pattern of unlawful conduct or that its fruits had been invested or used in an enterprise.

The actual setting for their claim for relief, too, lies squarely within one of RICO's most promising, if serendipitous, applications: to the thrift crisis -- and

in the similar crises in bank, insurance company, and pension plain insolvency. See Myths at 883-909 (review of facts and analysis of fraud as contributing to crises).

Congress recognizes the role that criminal misconduct plays in financial insolvency. H.R. Rep. No. 1088, 100th Cong., 2nd Sess. 2-13 (1988) (one-third of commercial banks and three-fourths of thrift failures criminal misconduct major factor).

The President promises "every effort to recover assets diverted from these institutions and to place behind bars those who...caused losses through criminal behavior." N.Y. times, February 7, 1989, at D8, col. 1.

This Court has recoginized that such crime is "[t]he most serious...crime problem in America today." Braswell v. United

States, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, Corporate and White Collar Crime, 17 Am. Crim. L. Rev. 287, 288 (1980)).

Tragically, however, the Ninth Circuit's illiberal rule, which it correctly describes as the "majority rule", threatens to sharply curtail the efforts of victims of sophisticated courses of criminal conduct in the savings and loan scandal to vindicate their rights and to contribute the substantial benefits of private enforcement under RICO to the public interest. See Agency Holding Corp., 483 U.S. at 151 ("private attorneys general [for] a serious national problem for which public prosecutorial resources be deemed inadequate") Shearson/American Express, Inc., 482 U.S. at 241 ("Vigorous incentives for plaintiffs to pursue RICO claims"); Sedima, 473 U.S. at 493 ("[P] rivate attorney provision...designed to

fill prosecutive gaps")[10]. The illiberal construction of RICO could not come, therefore, at a more inopportune time.s[11]

How this narrow illiberal approach can be squared with Congress' mandate for the liberal construction of RICO is not apparent. Nor can it be squared with the uniform teaching of this Court in RICO litigation, criminal or civil, See, e.g., Sedima, 473 U.S. at 497-98 ("RICO is to

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[10] See Note, Treble Damages Under RICO, 61 Notre Dame L. Rev. 526, 533-34 (1986) ("a powerful mechanism in the effort to vindicate the interest of those victimized by crime").

[11] See generally Prosecuting Fraud in the Thrift Industry: Hearings before the House Subcomm. on Crim. Justice, 101st Cong., 1st Sess. 73 (1989) testimony of Associate General Counsel G.A.O.: as of May 30, 1989, 16 of 26 failed thrifts studied, civil suits filed against officers, directors, borrowers, attorneys, and related persons, 6 of which included civil RICO counts requesting $638 million); N.Y. Times, Nov. 15, 1990, at C1, col. 6 (F.D.I.C. and R.T.C. to file $6.8 billion in RICO claims against Drexel Burnham Lambert, Inc.).

be read broadly.")

This Court consistently teaches that if RICO is to be narrowed, "it is a job for Congress if it is so inclined and not for" Circuit Courts. H.J. Inc., 492 U.S. at 249[12].

Congress is moving to meet its obligation. Congress has Article III powers to retain, modify, or repeal RICO, after hearings and debate. Nevertheless, Congress has consistently declined to change RICO's substantive elements or its remedial features, but has moved to limit civil RICO with a civil "gatekeeper"

[13] On the concept, see Hughes, RICO Reform: How Much is Needed?, 43 Vand. L. Rev. 639, 646 (1990) (Article of Rep. Hughes of N. J., the author of H.R. 1717)

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[12] See generally, Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982).

concept, which will parallel the exercise of criminal prosecutorial discretion.

It is hardly lawful for the Lower Courts, utilizing only Article III powers, to rewrite RICO instead of reading it. For the Lower Courts to narrow RICO by changing its substantive elements or its remedial features under the transparent guise of interpretation is a usurpation of the powers of Congress under Article II.

Because Congress is steadfastly refusing to alter the substantive elements or remedial features of RICO, the Lower Courts should not change what Congress has decided to leave alone. See Federenko v. United States, 449 U.S. 490, 513 (1981) (A court is "not at liberty to imply...a

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(continued) ("attempt to emulate the results attained by prosecutorial discretion")

condition which [is] opposed to the explicit terms of the statute...to (so) hold is not to construe the Act but to amend it.") (quoting Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 38 (1934)); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748 (1975) (The "[j]udiciary may not circumscribe [an express claim for relief]...because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.")

Nor can the narrow approach be squared with the analysis by this Court of those textual provisions that are most analogous to RICO. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) (pattern of discrimination in housing) (if one act is part of a continuing offense, even if it is directed toward another, and it is within the period, then all acts within the pattern are within the period).

The Havens decision is the precedent that this Court ought to apply in the case at bar. RICO ought to be interpreted similar to the Civil Rights Laws because it deals with a pressing National problem.

Under the lower courts' "majority rule", RICO is less potent than the Civil Rights Laws. Respect for the even-handed application of the law requires a more consistent and text-based approach.

This Court's approach to the exercise of its Certiorari jurisdiction is well established. The resolution of conflicts "is one of the traditional function of this Court." Charles Dowd Bos Co. v. Courtney, 368 U.S. 502, 514 (1962). See Moskal v. United States, 111 S. Ct. 461, 464 (1990) (" to resolve a divergence of opinion among the courts of appeals.") "[I]mportant and recurring" issues ought to be settled, Glus v. Brooklyn Eastern

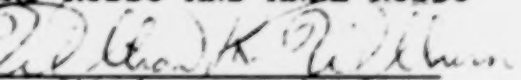
District Terminal, 359 U.S. 231, 232 (1959), which affect a "considerable number of suits," Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 237 (1964). Under these standards, this petition is, therefore, eminently Certiorari-worthy[14].

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

ALBERT RUSSO AND ANNE RUSSO

By 

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[14] In Laumpf Plevahipkin Prupis & Petigrow, Gilberson, ___ U.S. ___, 111 S. Ct. 242 (1990), this Court granted Certiorari to resolve a conflict on the period of the limitations under the federal security statutes. Here, it ought to do no less.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT & ANNE RUSSO, Plaintiffs/Appellants, v. MASON-McDUFFIE INVESTMENT Co. Inc., a dissolved California corporation, Defendant/Appellee.	)	No. 89-16268 DC# CV-89-2235-WWS **MEMORANDUM**

Appeal from the United States District Court for the Northern District of California
William W. Schwarzer,
District Judge, Presiding

Argued and Submitted January 16, 1991
San Francisco, California

Before: TANG, BOOCHEVER, and NOONAN, Circuit Judges

In early July, 1981, appellants Albert and Anne Russo invested in Saratoga Square, a real estate project in San Jose, California, by allowing Equity Development Company (Equity), the developer of Saratoga Square, to use appellants's real estate

as collateral to obtain an $844,000.00 loan from State Savings and Loan Association (State Savings). Equity used the loan proceeds to finance the down payment on the project; in return, Equity promised appellants four condominiums in the project plus $15,000.00

Equity subsequently obtained a construction loan from State Savings. In September, 1982, after Equity had defaulted on construction loan, State Savings initiated foreclosure proceedings on Saratoga Square; the proceedings were completed on May 23, 1983. Because the sale of the project satisfied the debt, appellant's property was released.

On October 24, 1986, appellants filed their first complaint in federal court. The complaint named, among others, Mason-McDuffie and State Savings as defendants. Appellants alleged the defendants participated in a real estate bust-out scheme

which prevented them from making their profit in Saratoga Square. Mason-McDuffie allegedly "participated in the buy-sell program with knowledge of its fraudulent nature as a "flogger" by soliciting victims for the program as an agent for State and functioning as the first step in the loan approval process." Mason-McDuffie also allegedly pretended "to be the agent for the victims" and provided "phony takeout commitments on projects, including Saratoga Square."

Appellants admit they became aware of the fraud no later than October 30, 1983. Appellants claimed the bust-out scheme violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1962(a)-(d), and the Securities Exchange Act of 1934, 15 U.S.C. Section 78(g)(b) & 78(j)(b). The complaint also contained state law claims for fraud,

fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty.

On July 7, 1987, the defendants moved to dismiss the case for untimely service. On August 13, 1987 the court denied the motion. But, based on the defendant's motion for reconsideration, the court subsequently dismissed the first action on May 24, 1988.

Two weeks after the defendants filed the motion to reconsider in the first action, appellants filed a second complaint. Appellants again failed to timely serve Mason-McDuffie in the second suit. Hence, on October 26, 1988, the court dismissed Mason-McDuffie from the second suit.

More than four months later, on March 1, 1989, appellants filed on a third suit, the case at bar, naming only Mason-McDuffie as a defendant. On August 23, 1989, the district court dismissed appel-

lants's third action on the grounds that all of the claims fell outside the applicable statutes of limitations. The Russos appeal from that judgment. We affirm.

DISCUSSION

A. Standard of Review

This court reviews a district court's grant of a motion to dismiss de novo. Kruso v. International Tel & Tel Corp.,., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, ____ U.S. ____, 110 S. Ct. 3217 (1990). Determining whether the district court "applied the correct statute of limitations also is a question of law, reviewed de novo." Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 591 (9th Cir.), cert. denied, ____ U.S. ____, 111 S. Ct. 75 (1990) (citation omitted). But "where the issue of limitations required determination of when a

claim begins to accrue, the complaint should be dismissed only if the evidence is so clear that there is no genuine factual issue and the determination can be made as a matter of law." Id. (citation omitted).

B. Accrual of the RICO claim

The rule in the Ninth Circuit is that a civil RICO claim accrues when a party knows or has reason to know of his injury. This rule is based on RICO's civil remedy section, which permits suit by a person "injured in his business or property." 18 U.S.C. Section 1964(c) (1988). "The civil remedy provision's focus upon injury as opposed to existence of a conspiracy suggests that the normal federal rule on accrual [a claim accrues when the plaintiff knows or has reason to know of the injury] should apply to civil RICO actions alleging conspiracy." Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984); see also

Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990); Volk v. D. A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987).

As all the claims in Compton accrued outside the limitations period, the court "did not have occasion to decide the extent to which separate injuries sustained within the limitations period might be actionable despite the existence of some time-barred causes of action." State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). Subsequent Ninth Circuit decisions held that a new claim could accrue during the limitations period only if new overt acts occurred. Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988); Ammann, 828 F.2d at 5. A majority of circuits agree with this court's reasoning and have adopted similar rules for the accrual of

civil RICO claims. Rodriguez v. Banco Central, 917 F.2d 664, 665-66 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102-05 (2d Cir. 1988), cert. denied, ____ U.S. ____, 109 S. Ct. 1642 (1989); Pochahantas Supreme Coal Co., Inc. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987); La Porte Const. Co., Inc. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1984) (per curiam).

Relying on recent Supreme Court and Third Circuit decisions appellants contend our rule "misses the boat." We disagree. First, it is clear that no Supreme Court decision requires this court to change its civil RICO accrual rule. In Agency Holding Corp. v. Malley-Duff & Assoc. Inc., 483 U.S. 143, 156 (1987), the Supreme Court held that the four-year statute of limitations for Clayton Act actions applies to RICO civil enforcement actions. The Malley-Duff Court expressly

stated, however, that it had "no occasion to decide the appropriate time of accrual for a RICO claim." Id. at 157. Appellants refer us to H.J. Inc. v. Northwestern Bell Tel. Co., ____ U.S. ____, 109 S. Ct. 2893 (1989), and Sedima v. Imrex, 473 U.S. 479 (1985), but neither H.J. Inc. nor Sedima resolves the issue of when a civil RICO claim accrues.

Appellants also refer us to a Third Circuit case, Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1133-34 (3d Cir. 1988). Keystone held in part that a civil RICO claim accrues "when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity." Id. at 1130. We are not persuaded by Keystone. As the Second Circuit has noted, a civil RICO claim should accrue when a plaintiff knew or

should have known of the injury, because Congress tied the right to recover damages under RICO "not to the time of the defendant's RICO violation, but to the time when [a] plaintiff suffers injury to 'his business or property.' "Bankers Trust, 859 F.2d at 1103.

The Ninth Circuit's approach also is consistent with the accrual rules which govern the Clayton Act, and "the civil action provision of RICO was patterned after the Clayton Act." Malley-Duff, 483 U.S. at 150; see also Bankers Trust, 859 F.2d at 1104. Keystone on the other hand "does not seem to reflect Clayton Act Principles." Rodriguez, 917 F.2d at 666. Moreover, Keystone's approach creates an undesirably long period of limitations and, unlike the majority rule, is in no way similar to the accrual principles for fraud, "which is often the crime that underpins private RICO actions." Id.

(citations omitted).

Appellant's remaining arguments which reflect or are closely related to the reasoning in Keystone also lack merit. First, we reject appellant's contention that 18 U.S.C. Section 1961(5), RICO's definition of a "pattern of racketeering activity," determines when a civil RICO claim accrues. The definition of pattern in no way establishes an accrual rule. We also reject appellants's argument that this court had added "an injury element to the RICO statute not found elsewhere in its text." The injury element for this circuit's civil RICO accrual rule comes directly from the text of RICO's civil remedy section, 18 U.S.C. Section 1964(c), which permits suit only by a "person injured in his business or property." Finally, we reject appellants's argument that this court has failed to recognize

that RICO is a continuing offense; to the contrary, we have previously held that even though some civil RICO claims may be time-barred, new claims "could accrue during the limitations period if new overt acts occur." Madariaga, 851 F.2d at 275 (citing Ammann, 828 F.2d at (Kennedy, J., concurring)).

In sum, we find no reason to question this court's rule for the accrual of civil RICO claims. Under this rule, appellants's RICO claim clearly falls outside the applicable four-year statute of limitations: appellants were injured on May 23, 1983, when the foreclosure proceedings on Saratoga Square were completed; they admit they became aware of the alleged fraudulent scheme no later than October 30, 1983; and appellants filed the case at bar more than five years after both of these dates. Appellants do not argue that their securities claim was

timely or tolled.

C. Tolling

1. Pendent State-law Claims

Appellants also alleged state-law claims for fraud, fraudulent inducement, negligent misrepresentation, and breach of fiduciary duty. At most, a three-year limitations period applies to each of these claims, Cal. Civ. Proc. Code Section 338(d) (West 1990); San Filippo v. Griffiths, 51 Cal. App. 3d 640, 645, 124 Cal. Rptr. 399, 402 (1975), and the claims accrued upon "the discovery, by the aggrieved party... of the facts constituting...the [fraud]." Cal. Civ. Proc. Code Section 338(d) (1990). Appellants admittedly discovered the alleged fraud no later than October 30, 1983. Consequently, the state law claims which were filed on March 1, 1989, fall outside the three-year limitations period.

Appellants therefore argue that their previously filed complaints tolled the period. This court looks to state law, to the extent it is consistent with federal law, to determine whether state law claims are tolled. Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988). "California equitably tolls a statute of limitations during the dependency of an earlier action if there is 'timely notice, and onprejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'" Id. at N.4 (quoting Addison v. State, 21 Cal. 3d 313, 319, 578 P.2d 941, 943-44, 146 Ca. Rptr. 224, 227 (1978)). All three elements of Addison's test should be considered. Id.

Appellants's tolling arguments lack merit. Appellants filed their first claim on October 24, 1986, four days before the limitations period was to expire; appellants then failed to timely serve any

of the defendants. Failing to timely serve a party evinces a lack of reasonable conduct which defeats a claim for equitable tolling. In Wood v. Elling Corp., 20 Cal. 3d, 572 P.2d 755, 757-58, 353, 358-60, 142 Cal. Rptr. 696, 698-99 (1977), the California Supreme Court held that a previously filed but not served complaint does not toll the limitations period. Elling explained that in failing to timely serve a defendant, the plaintiff fails "to diligently pursue the sole avenue of legal recourse available to him." Id. 20 Ca. 3d 572 P.2d at 758 n.4, at 359 n.4, 142 Cal. Rptr. at 699 n.4.

Appellants next argue their claims were tolled because the district court and the defendants caused the delay. But, assuming arguendo there was some delay caused by the district court or the defendants, appellants's third suit was

necessary because appellants failed to serve appellee Mason-McDuffie timely in their second suit, as well as their first; appellants then waited four more months to file their third suit. Appellants's unreasonable and careless conduct in their first two suits precludes this court from applying equitable tolling principles to their third suit.

Appellants's final conspiracy argument, which is based on Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979), similarly lacks merit. In Wyatt the court noted the defendants's fraudulent loan scheme caused the plaintiffs to refinance and continue paying off a loan right up until trial. The court held that the economic duress which the fraudulent scheme continued to impose on the plaintiffs tolled the statute of limitations. Id. 24 Cal. 3d at 788, 598 P.2d at 54, 157 Cal. Rptr. at

401. In the case at bar, there is no claim that "economic duress or undue influence" continue to "hold [appellants]... in place." Id (emphasis omitted).

2. The RICO Claim

Federal law governs the tolling of federal claims. Emrich, 846 F.2d at 1199. The Supreme Court has stated: "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984). Because appellants were not diligent in pursuing their first two suits, equitable tolling does not save the RICO claim in their third suit.

D. Attorneys' Fees and Double Costs

Appellee's request for attorneys's fees and double costs is denied. Although appellants's tolling arguments lack merit,

their argument as to the accrual of civil RICO claims is based on a Third Circuit opinion which ultimately proved worth arguing although the argument was unavailing for appellants.

AFFIRMED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBERT & ANNE RUSSO, Plaintiffs, v. MASON-McDUFFIE INVESTMENT CO. Inc., a dissolved California corporation, Defendant.	No. C-89-2235-WWS **ORDER**

Plaintiffs Albert and Anne Russo ("the Russos") filed this action on March 1 1989. They allege that they were injured by a real estate "bust out" scheme in which defendant Mason-McDuffie Investment company ("Mason-McDuffie") participated. The complaint contains four claims of violation of the Racketeering Influenced and Corrupt Organization Statute, 18, U.S.C. Section 1962(a)-(d), and one claim of securities fraud in violation of

the Securities Exchange Act of 1934, 15 U.S.C. Section 78(j)(b), and its implementing regulations. It also contains state law claims of fraud, fraudulent concealment, negligent misrepresentation and breach of fiduciary duty.

Mason-McDuffie now moves, pursuant to Rule 12(b)(6), (1) to have the RICO claims dismissed on the ground that the four-year statute of limitations has run, and (2) to have the claims of securities and common law fraud, fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty dismissed on the ground that the three-year statute of limitations has run.

I. Background

The complaint contains the following allegations:

The Russos invested approximately $844,000 in a real estate development

known as Saratoga Square. Cmplt. 107. They pledged equity in certain real property as security for a loan, the proceeds of which were used as the down payment on a construction loan to a developer, Equity Development Company ("Equity"), who was to develop Saratoga Square. Cmplt 105. The lender was State Savings. Cmplt 105(a). Equity defaulted on the construction loan; in September 1982, State Savings commenced foreclosure proceedings on the development properties, Cmplt 28. The sale of the properties satisfied the developer's debt to State Savings, and the real estate that the plaintiff had pledged as security was released. Cmplt 111.

The injury alleged by the Russos is that they did not make a profit on their investment in Saratoga Square. Cmplt 112.

The Russos allege that they discovered in October, 1983 that this financing

arrangement was a part of a scheme by State Savings and a group of other individuals. See Cmplt 113. They describe the scheme as follows: State Savings would agree to loan construction funds to developers at over 110% of the fair market value of a project. Cmplt 77. State Savings would then purchase the land to be developed at its fair market value, and mark it up to include an anticipated profit. Cmplt 78. It would then resell this land to the developer at the increased price, by making two loans to the developer -- a land loan and a construction loan. Id. Investors like the Russos would pledge the equity in their real estate for loans of money which they would then invest the development; this money would provide the developers with cash for down payments on the purchase of the land. Cmplt 80. State Savings would provide

inadequate funding to complete the developments, encourage further development by promising to provide additional funding, and then foreclose on the project and on the property pledged by investors. Cmplt 82.

Mason-McDuffie is alleged to have "aided and abetted" and "conspired" with the other parties involved, who are not named as defendants, and to have provided "phony take-out commitments on projects" -- a take-out commitment being an agreement by a lender to provide mortgage financing to potential buyers once a project is built -- and to have solicited others, although not the Russos, to invest in such developments. Cmplt 31, 83, 92(h). The Russos allege that they discovered Mason-McDuffie's involvement in September 1985. Cmplt 31.

This scheme is alleged to continue to date as State Savings, and American Sav-

ings and Loan Corporation with which State Savings merged, have foreclosed on development property and created new fraudulent schemes in which the foreclosed-upon property is sold to new persons, on terms resulting in "pre-planned foreclosures." Cmplt 18, 76, 97.

II. Discussion

A. RICO Claims

A four-year limitations period applies to RICO claims. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 156 (1987). Mason-McDuffie contends that the limitations period began to run when plaintiffs had notice of the wrongful conduct, and thus the Russos' claims are barred. The Russos contend that the limitations period did not begin to run until the last act of the pattern has been committed, and because they have alleged a continuing wrong, the limitations period

has not yet begun to run.

The Ninth Circuit has repeatedly stated that a RICO cause of action accrues when the plaintiff knows or has reason to know of the injury. Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988); State Farm Mutual Automobile Insurance Co. v. Ammann, 828 F.2d 4, 5 (9th Cir. 1987); Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984).

The last overt act in furtherance of the scheme alleged by plaintiff that can have injured the Russos is the foreclosure on and sale of the Saratoga Square property, which occurred in 1983. The Russos knew at that time that they would be unable to make a profit on their investment in Saratoga Square. This act occurred six years before this action was filed. Accordingly, the Russos' RICO

claims are barred.

B. Securities Fraud and State Law Claims

Mason-McDuffie contends that the applicable limitations period is the three-year limitations period in California Code of Civil Procedure Section 338(4) and that it bars the Russo's claims of securities fraud, common law fraud, fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty. The Russos do not contend that this is not the applicable period. rather, they contend that they are entitled to equitable tolling of the limitations period because of their previously filed complaints. They rely on Addison v. State, 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 227 (1978), in which the California Supreme Court held that filing and pursuing an action in federal court tolled the limitations period, so that the plaintiffs could

refile the action in state court after it was dismissed in federal court for lack of subject matter jurisdiction. In Addison, the court stated that "application of the doctrine of equitable tolling requires timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on th part of the plaintiff." 21 Cal. 3d at 319; 146 Cal. Rptr. at 227; see also Collier v. City of Pasadena, 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681, 685 (2d Dist. 1983) (California Courts of Appeal treat this language as creating a three-prong test for whether equitable tooling should be applied).

The doctrine of equitable tolling does not apply here, because the Russos did not act reasonably in failing to timely serve the complaints on Mason-McDuffie in either or their two earlier actions in this court. In Wood v. Elling

Corp., 20 Cal. 3d 353, 359-60, 142 Cal. Rptr. 696, 698-99 (1977), the California Supreme Court held that a previously filed, but not served, Complaint, does not toll the statute of limitations. In Elling the court noted that unlike where a plaintiff is pursuing a parallel action in another forum, where the plaintiff has filed but not served a previous complaint, a court is faced with "a plaintiff's failure to diligently pursue the sole avenue of legal recourse available to him." 20 Cal. 3d at 359, n.4; 142 Cal. Rptr. at 699, n.4

III. Conclusion

For these reasons stated above, the Russos' complaint against Mason-McDuffie is dismissed with prejudice.

IT IS SO ORDERED.

Dated: August 23, 1989

WILLIAM W. SCHWARZER
United States District Judge

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

(2)

No. 90-1757

In The

Supreme Court of the United States

October Term, 1990

ALBERT RUSSO AND ANNE RUSSO,

Petitioners,

v.

MASON-McDUFFIE INVESTMENT CO.,
a dissolved California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a plaintiff bring a civil RICO claim more than five years after discovering both his injury and the existence of a pattern of racketeering activity?

LIST OF PARTIES

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit.

1. Albert and Anne Russo, appellants below and petitioners in this Court; and

2. Mason-McDuffie Investment Co., appellee below and respondent in this Court. Mason-McDuffie Investment Co. is a dissolved corporation. Before its dissolution in 1982, Mason-McDuffie Investment Co. was wholly owned by Mason-McDuffie Co., a partnership.

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No. 90-1757

In The

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ALBERT RUSSO AND ANNE RUSSO,

Petitioners,

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MASON-McDUFFIE INVESTMENT CO.,
a dissolved California corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Mason-McDuffie Investment Co., Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed May 15, 1991, by Albert and Anne Russo, Petitioners.

JURISDICTION

Jurisdiction is based upon 28 U.S.C section 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

1. Russo's Allegations

On March 1, 1989, petitioners Albert and Anne Russo ("Russo") filed this lawsuit. The action arises from events that occurred in 1981-83.[1]

In early July of 1981, Russo pledged certain real property as collateral for an $844,000 loan by State Savings and Loan Association ("State Savings") to Equity Development Company ("Equity"), a real estate developer. Equity used the loan proceeds as a down payment for the purchase and development of a project known as Saratoga Square in San Jose, California. Equity planned to construct the proposed project with the proceeds of a separate construction loan from State Savings. In return for putting up his property as collateral, Russo was to receive four condominium units plus $15,000, for a total projected return of approximately $555,000.

In 1982, Equity defaulted on its construction loan, and State Savings instituted foreclosure proceedings on Saratoga Square. Those proceedings concluded on May 23, 1983. Because the sale of the project satisfied the debt, Russo's property was released as collateral. However, according to Russo's complaint, the foreclosure on

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[1] This petition seeks review of an order of dismissal entered pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, for the purposes of this factual statement, Russo's allegations are taken as true.

Saratoga Square "wiped out any chance for recovery of profit for plaintiff Russo." ER 1, ¶ 111.[2]

According to Russo, his "injury occurred on May 23, 1983, the date [the] foreclosure was complete." Petition at 7. By October 30, 1983, Russo had discovered "the fraudulent character of the financing of the real estate project. . . . " *Id.* at 6. On that date, according to Russo's complaint, Russo "became aware of the fact that State's bust-out scheme had prevented plaintiffs from making their profit" on Saratoga Square. ER 1, ¶ 113.

2. Mason-McDuffie's Alleged Role

Mason-McDuffie Investment Co. ("Mason-McDuffie") had absolutely no contact with Russo. ER 1, ¶¶ 85-92. It did not solicit Russo's investment in Saratoga Square, nor did it otherwise participate in the transaction by which Russo pledged his property as security for Equity's loan.

Russo alleges only that Mason-McDuffie "participated" in other, unrelated transactions. *Id.*, ¶ 74.

B. Proceedings in the Courts Below

1. Russo I

On October 24, 1986, Russo filed his first federal court complaint (*"Russo I"*), alleging violations of the Racketeer Influenced and Corrupt Organizations Act

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[2] "ER" refers to the Excerpts of Record filed in the Court of Appeals for the Ninth Circuit.

("RICO") and various other claims.[3] The complaint named State Savings, Mason-McDuffie, and others as defendants. Russo alleged that the defendants had participated in a real estate "bust-out" scheme that prevented him from making his profit in Saratoga Square. On May 24, 1988, pursuant to Federal Rule of Civil Procedure 4(j), the district court dismissed *Russo I* for untimely service.

2. Russo II

On October 27, 1987, while the motion to dismiss for untimely service was pending in *Russo I*, Russo filed a second complaint in federal court (*"Russo II"*), again alleging RICO violations. However, Russo again failed to serve Mason-McDuffie within 120 days of filing. When this fact was called to his attention, Russo stipulated that Mason-McDuffie could be dismissed. On October 26, 1988, pursuant to stipulation, the court entered an appropriate order of dismissal.[4]

3. Russo III

On March 1, 1989, more than four months after the dismissal of Mason-McDuffie from *Russo II*, and more

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[3] The Petition incorrectly states that "[i]n October, 1983, when they learned they were victims of a scheme to defraud, the Russos filed suit." Petition at i. Russo did not file his first complaint until 1986.

[4] Russo subsequently amended his complaint in *Russo II*, dismissing all defendants except Mason-McDuffie. Upon realizing his error in dismissing the other defendants, Russo moved for leave to amend. The district court denied that motion, and Russo appealed. Ultimately, the parties settled, resulting in the voluntary dismissal of Russo's appeal.

than five years after he allegedly discovered the fraudulent "bust-out" scheme, Russo filed this action. Because *Russo II* continued against the other defendants, Russo named only Mason-McDuffie as a defendant in this action.

Mason-McDuffie moved to dismiss based on the applicable statutes of limitations. The district court (Judge William W Schwarzer, presiding) granted the motion and dismissed all claims with prejudice.

On appeal, the Ninth Circuit affirmed, ruling:

> [A]ppellant's RICO claim clearly falls outside the applicable four-year statute of limitations: appellants were injured on May 23, 1983, when the foreclosure proceedings on Saratoga Square were completed; they admit they became aware of the alleged fraudulent scheme no later than October 30, 1983; and appellants filed the case at bar more than five years after both of these dates.

Russo now brings this petition for writ of certiorari, urging the Court to reject the Ninth Circuit's "narrow illiberal" accrual rule in favor of a more expansive approach. However, because Russo's claims are clearly time-barred under any plausible rule of accrual, and because those claims do not merit a favorable exercise of this Court's discretion, Mason-McDuffie respectfully requests that the petition be denied.

ARGUMENT

A. Because Russo's RICO Claims Are Time-Barred Under Any Plausible Accrual Rule, His Case Is Not An Appropriate Vehicle For Review Of This Issue.

Russo asserts that his petition "offers a comprehensive vehicle to examine each of the relevant contours" of the accrual issue. Petition at 18. However, Russo's RICO claims remain time-barred under any viable rule of accrual. Because resolution of this question is not necessary to the determination of Russo's claim, this Court should defer its discretionary review until a case presents the accrual issue within a meaningful factual context.

In *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 156 (1987), this Court held that a four-year limitations period applies to RICO claims. However, because the RICO claims in that case clearly accrued within the four-year period, the Court "ha[d] no occasion to decide the appropriate time of accrual for a RICO claim." *Id.* at 156-57. The federal circuit courts have since had numerous occasions to consider the issue. While commentators have devised various taxonomies for categorizing the accrual rules applied,[5] recent case law

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[5] *See* Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) (identifying the discovery rule, the separate accrual discovery rule, the last predicate act rule, the last predicate act discovery rule, and the Clayton Act rule); Note, *"Mother of Mercy, Is This The Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 67 N.Y.U.L. Rev. 172 (1990) (identifying discovery rule, antitrust rule, last-act rule, last-act discovery rule, and last-injury discovery rule) [hereinafter *"RICO Accrual"*].

reveals two functional approaches: the "injury discovery" rule and the "pattern discovery" rule. Under either of these rules, Russo's RICO claims are untimely.

1. Because Russo Discovered His Injury In May Of 1983, His RICO Claims Are Time-Barred Under The "Injury Discovery" Rule.

Under the "discovery of the injury" approach followed by six circuits,[6] a civil RICO claim accrues when a plaintiff knows or has reason to know of the injury forming the basis for his claim. Clearly, this approach bars Russo's RICO claims.

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[6] *See Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990) (limitation period begins when "a plaintiff knows or should know of the injury which is the basis for the action"); *Rodriguez v. Banco Central*, 917 F.2d 664, 666 (1st Cir. 1990) (statute starts running "when a plaintiff knew or should have known of his injury"); *Hofstetter v. Fletcher*, 905 F.2d 897, 904 (6th Cir. 1988) ("the trial court correctly instructed the jury to determine whether plaintiff knew or should have known of the defendant's fraudulent scheme"); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) ("each time a plaintiff suffers an injury . . . a cause of action to recover damages based on that injury accrues to plaintiff at the time he discovered or should have discovered the injury"), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethelehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) ("statutory period begins from when a plaintiff knows or should know of the injury that underlies his cause of action"); *LePorte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986) (limitations period begins when plaintiff "discovers, or, in the exercise of reasonable diligence, should have discovered, the alleged fraud"). *See also State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987).

Russo admits that he knew of his alleged injury in May of 1983, when State Savings foreclosed on the Saratoga Square property. Petition at 7. He filed his complaint in *Russo III* on March 1, 1989, almost six years after discovering the loss of his anticipated profits in Saratoga Square. Accordingly, the Ninth Circuit and the district court correctly held that Russo's claims were untimely under the "injury discovery" rule.[7]

2. Because Russo Knew In October Of 1983 That His Alleged Injury Was Part Of A Fraudulent Pattern, The "Pattern Discovery" Rule Bars His Claim.

Russo argues that the "narrow illiberal" rule applied by the Ninth Circuit is inconsistent with "Congress' mandate for the liberal construction of RICO." Petition at 21. However, even under the more expansive "discovery of the pattern" approach recently adopted by three federal circuits,[8] Russo's claims are similarly barred.

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[7] If Russo had timely served his first suit against Mason-McDuffie, which he filed in October 1986, his RICO claim would have been timely under the "injury discovery" rule.

[8] *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991) ("[W]ith respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern."); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990) (same); *Bivens Gardens Office Bldg., Inc. v. Barrett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 1695 (1991).

Under the "pattern discovery" rule, "a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." *Granite Falls Bank*, 924 F.2d at 154. Here, Russo admits that, by October 30, 1983, he had discovered the fraudulent "bust-out" scheme. Petition at 6; ER 1, ¶ 113. Nonetheless, Russo did not file the complaint at issue here until 1989, more than five years later.[9] Accordingly, even under the "pattern discovery" rule, Russo's RICO claims are barred by the statute of limitations.[10]

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[9] If Russo had timely served either *Russo I* or *Russo II*, his RICO claims might have been timely under the "pattern discovery" rule.

[10] Russo has suggested a third possible approach, but that approach lacks plausibility because it ignores the logic of this Court's decision in *Malley-Duff*. Russo suggests that the limitations period should commence only upon "the end of the unlawful conduct of the perpetrator . . . . " Petition at ii. Only one court of appeals supports this view. In *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988), the Third Circuit stated that in "multiple injury, multiple victim" cases, the limitations period begins to run when plaintiff knows or should know that an act causing injury is part of a pattern of racketeering, "unless, as part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity." Courts and commentators have consistently criticized *Keystone*, particularly its focus on the "last predicate act." *See, e.g., Granite Falls Bank*, 924 F.2d at 154 (adopting pattern-discovery rule, which "better reflects the underlying policy of a statute of limitations requiring

(Continued on following page)

3. Because Russo's RICO Claims Are Untimely Under Any Rule Of Accrual, The Resolution Of This Question Is Irrelevant To The Outcome Of Russo's Case.

In sum, no plausible accrual rule – however "liberal" – will save Russo's RICO claims from untimeliness. That untimeliness was caused, not by any "sophisticated course of criminal conduct" on the part of Mason-McDuffie, but by Russo's own failure to perfect timely service in his first two RICO actions. In cases such as this, where the resolution of an admitted conflict between the circuits would have no effect on the result below, denial of certiorari is appropriate. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted).

Tacitly admitting the factual weaknesses in his own case, Russo seeks to re-cast his claims in terms of the

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(Continued from previous page)

diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*"); *RICO Accrual, supra* note 5, at 223 (noting that Keystone's last-act discovery rule "can extend the statute of limitations indefinitely, contravening the principles underlying the limitation of actions and providing a wind-fall time-period to the plaintiff within which to bring her suit"). By focusing on the "last predicate act," the *Keystone* approach essentially ignores this Court's admonition in *Malley-Duff* that "[a] federal cause of action brought at any distance of time would be utterly repugnant to the genius of our laws." 483 U.S. at 156 (citations omitted).

greater social welfare. In this vein, Russo argues that his case is relevant to the current savings and loan crisis, that the Ninth Circuit's "narrow illiberal" approach to accrual "could not come at a more inopportune time" for the victims of that crisis, and that this question is therefore an "important and recurring" issue affecting "a considerable number of suits." Petition at 18-21, 25-26. Undoubtedly, one of those suits will present a meaningful factual context for deciding the accrual issue. This case does not.

B. Equitable Concerns Weigh Against This Court's Grant Of Discretionary Review

Beyond the irrelevance of the accrual issue to the ultimate outcome of this lawsuit, there are several equitable reasons why the Court should not exercise its "sound judicial discretion" in Russo's favor.

First, Russo alleges no real, "out-of-pocket" injury. He recovered the property that he had pledged as collateral. His claim relates only to alleged lost "profits."

Second, Mason-McDuffie had no role in soliciting Russo's investment in the "bust-out scheme." According to Russo, State Savings and Equity contacted him initially, procured his investment in Saratoga Square, and promised him profits from the project. ER 1, ¶¶ 104 and 108. Mason-McDuffie was not involved in that process. Thus, Russo's claims against Mason-McDuffie are, in a sense, "peripheral." Moreover, having dissolved in 1982, Mason-McDuffie did not engage in any further business, much less commit any further "predicate acts."

Third, Russo has had his "day in court," at least with respect to the numerous other defendants in *Russo II*. Russo took *Russo II* to the Ninth Circuit Court of Appeals, ultimately dismissing his appeal after settling the case.

Finally, Russo's certiorari petition arises solely because of his failure to perfect timely service in *Russo I* and *Russo II*. There is no reason for this Court to exercise its discretion favorably on behalf of a litigant who has consistently demonstrated such a lack of diligence.

CONCLUSION

For these reasons, Mason-McDuffie respectfully urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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No. 90-1757

IN THE

Supreme Court of the United States

October Term 1990

ALBERT RUSSO and ANNE RUSSO,
Petitioners,

v.

MASON-McDUFFIE INVESTMENT CO., INC.,
a dissolved California corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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MASON-McDUFFIE
INVESTMENT CO., INC.,
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corporation,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Albert Russo and Anne Russo submit this brief in reply to Respondent's ("Mason-McDuffie") Opposition to the Petition for Certiorari May 15, 1991, by Albert and Anne Russo, Petitioners, in the United States Supreme Court.

1. MASON-McDUFFIE CONCEDES THAT

PETITIONERS RUSSO WIN IF THIS COURT ADOPTS THE KEYSTONE RULE.

Nowhere in the opposing memorandum do Respondents refute the fact that if this Court adopts Keystone, Petitioners Russo will win. Instead of directly meeting the issue, Mason-McDuffie buries a discussion of Keystone in footnote 10 (page 9) of their opposing brief without ever mentioning whether the period of limitation should commence only upon the end of the unlawful conduct of the perpetrator. Mason-McDuffie thus concedes that its continuing unlawful conduct in the same pattern of racketeering activity, as alleged in the Complaint in the Court below, will permit the Russos to try their case against Mason-McDuffie.

Mason-McDuffie attempts to deflect the Court's attention by claiming to be a

person not subject to suit because it only participated in the pattern of racketeering activity that hurt the Russos instead of being the person that directly hurt the Russos (Respondent's Brief in Opposition "RB":3). However, the RICO statute is express that racketeering activity is actionable if it "indirectly" injures a plaintiff and such conduct is within Congress' expansive intent in the RICO statute (18 U.S.C. Section 1962 (a-d)). Mason-McDuffie's claim that the participation was "in other unrelated transactions" (RB:3) is contradicted by the Complaint which is not permitted on a Motion to Dismiss.

2. MASON-McDUFFIE CONCEDES THAT THERE IS A SPLIT AMONG THE CIRCUITS.

Despite the fact that this Court routinely and obviously should grant certiorari to resolve a division among the Circuits (RB:7, n. 6), Mason-McDuffie

stubbornly argues that the instant case is not "certiorari worthy" because the Keystone rule is not "plausible" or "viable" (RB:6). Mason-McDuffie's argument begs the question that this Court is called upon to decide in the instant case, which is whether the Keystone rule should be followed or the erroneous numerical majority against Keystone.

Mason-McDuffie's question begging argument is manifest when it leaps from its mischaracterization in topic 3A (RB:6) that Keystone is not "plausible" or "viable" to its unqualified assertion that Russo's claims "are untimely under any rule of accrual" (RB:10). Epithetical jurisprudence, putting modifiers on legal terms to support a fallacious conclusion, is not a substitute for reasoned argument before this Court. Under Keystone, plaintiffs win, and this Court should

avail itself of this opportunity to declare such the uniform nationwide rule.

3. THE RUSSO CASE IS AN APPROPRIATE VEHICLE TO ANNOUNCE A DECISION ON THE ACCRUAL ON THE STATUTE OF LIMITATIONS UNDER RICO.

Mason-McDuffie argues "equitable concerns" weigh against this Court's grant of certiorari based on assertions of fact that are not true.

First, Mason-McDuffie argues that lost profits are not "real" injury (RB:11). The lost profits in this case amount to $555,000.00. The damages are both real and substantial.

Second, Mason-McDuffie asserts that it had "no role" in soliciting Russo's investment in the bust-out scheme while ignoring the allegations of the Complaint that Mason-McDuffie had a central role in operating the bust-out scheme (i.e. participating in a pattern of racketeering

activity). The Complaint also alleges that Mason-McDuffie's relationship to various enterprises violated all four subdivisions of RICO. Accordingly, it is simply not true that Mason-McDuffie had "no role" in illegal activity despite the fact that other persons in the unlawful scheme in the same pattern of racketeering activity dealt with petitioners Russo. Mason-McDuffie is, in effect, ignoring two centuries of jurisprudence that holds people who participate in an illegal scheme with knowledge of their wrong-doing are liable for all consequences of their acts, whether the particular conduct involved in a particular plaintiff was theirs or not. RICO reaches "peripheral" defendants (RB:11) as much as central players in the pattern because the statute says "directly or indirectly".

Mason-McDuffie goes outside the

record in claiming that Mason-McDuffie was incapable of committing any further predicate acts because it dissolved (RB:11). However, the amoeba-like structure of the typical racketeering organization is exemplified by Mason-McDuffie's concession that, before its dissolution, it was owned by another organization, Mason-McDuffie Co., a partnership. Pointedly, Mason-McDuffie does not, and cannot, on this record claim that it did not commit further predicate acts because a successor entity carried on the business, or because the Complaint states that Mason-McDuffie was continually engaging in offenses long after its dissolution. Because this case comes to this Court on a Motion to Dismiss, such factual arguments cannot be raised by the Respondent.

Third, Russo has not had his "day in court" (RB:12). The settlement of Russo

II in the Ninth Circuit Court of Appeals was parsimonious. Russo has not had his day in court against Mason-McDuffie because other defendants chose to make a settlement.

Finally, the failures of the process server in Russo I and Russo II does not imply that the litigant has consistently demonstrated a lack of diligence (RB:12). On the contrary, the procedural problems in the earlier cases enhance the certiorari worthiness of this case. This case has no collateral or other issues that might cloud the presentation of the issue of whether the RICO statute of limitations will be allowed to accrue while the respondent is still engaging in the same pattern of racketeering activity as has injured petitioner. This case cleanly presents the sole issue to be resolved, whether this Court is going to

resolve the conflict between the Circuits by following the Third Circuit in Keystone or the other the Circuits.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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